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4 UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
6 OAKLAND DIVISION
7

8 UNITED STATES OF AMERICA,

Case No: CR 08-0194 SBA

9 Plaintiff,

ORDER

10 vs.

Docket 34, 36

11 JAMES RICHARDS,

12 Defendant.
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15 On March 26, 2008, James Richards ("Defendant") was charged in a three-count
16 Indictment with: (1) possession with intent to distribute crack cocaine in violation of 21
17 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); (2) felon in possession of a firearm and ammunition
18 in violation of 18 U.S.C. § 922(g)(1); and (3) using, carrying, and possessing a firearm
19 during, in relation to, and in furtherance of a drug-trafficking crime in violation of 18
20 U.S.C. § 924(c)(1)(A). Indictment, Dkt. 1. On December 16, 2008, the Defendant entered
21 a guilty plea to counts one and three of the Indictment pursuant to a plea agreement under
22 Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. Dkt. 25. At the time of
23 sentencing, the total Offense Level was 17 and Defendant was in Criminal History
24 Category V, yielding a guidelines range of 46 to 57 months for count one. Additionally,
25 Defendant was subject to a mandatory minimum of 60 months on count three under 18
26 U.S.C. 924(c)(1)(A), resulting in a guidelines range of 106-117 months. On December 16,
27 2008, the Court sentenced Defendant to 106 months (46 months on count one and 60
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1 months on count three to run consecutive), five years of supervised release, and ordered
2 Defendant to pay a mandatory special assessment of \$200. See Dkt. 24, 28.

3 The parties are presently before the Court on Defendant's motion under 18 U.S.C. §
4 3582(c)(2) for a 16-month reduction in his sentence from 106 months to 90 months based
5 upon amendments to the United States Sentencing Guidelines ("Guidelines") which
6 retroactively modified guideline ranges for crack cocaine offenses. Dkt. 34. Alternatively,
7 the Defendant requests the Court reduce his sentence by 16 months "on its own motion"
8 under § 3582(c)(2). Dkt. 36. The United States of America ("government") opposes a
9 sentence reduction on two grounds: (1) the Defendant waived his right to file a § 3582
10 motion in his plea agreement; and (2) the interests of justice do not support a reduction in
11 Defendant's sentence. Dkt. 38. The probation officer has submitted a report stating that the
12 guidelines range that would have been applicable if the amendments had been in effect at
13 the time Defendant was sentenced is 30 to 37 months for count one based on an adjusted
14 total Offense Level of 13 and a Criminal History Category of V. The report states that the
15 consecutive mandatory minimum of 60 months for count three under § 924(c)(1)(A) results
16 in an adjusted guidelines range of 90-97 months. While the probation officer concludes
17 that Defendant is eligible for a sentence reduction, she recommends that the Court deny
18 Defendant's request for a sentence reduction based on his post-sentencing conduct and
19 public safety concerns.¹ Having read and considered the papers submitted in connection
20 with this matter as well as other relevant materials in the record, the Court hereby DENIES
21 Defendant's request for a sentence reduction, for the reasons stated below.

22 **I. DISCUSSION**

23 The Fair Sentencing Act of 2010 ("FSA") modified, among other things, the
24 penalties for crack cocaine offenses by reducing sentencing disparities between crack and
25 powder cocaine offenses. United States v. Pleasant, --- F.3d ----, 2013 WL 11892, at *1
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27 ¹ Specifically, the probation officer recommends that Defendant's motion be denied
28 because "he appears to present a continued risk to the community and resistance to
rehabilitation" based on his lengthy disciplinary record while in custody.

1 (9th Cir. 2013). On November 1, 2010, the U.S. Sentencing Commission exercised its
2 authority under the FSA by issuing Amendment 748, which revised penalties for crack
3 cocaine offenses under the § 2D1.1(c) drug quantity table. Id. The Commission then
4 issued Amendment 750, which made the Amendment 748 changes permanent. Id. Finally,
5 the Commission issued Amendment 759, which: (1) made the Amendment 750 changes
6 retroactive; and (2) modified § 1B1.10, which governs when a sentence may be reduced by
7 reason of a retroactive guideline amendment. Id.

8 In light of these amendments, the Defendant now moves for a reduction of his
9 sentence under § 3582(c)(2). Dkt. 34, 36. Specifically, the Defendant requests the Court
10 reduce the sentence for his crack cocaine offense by 16 months from 46 months to 30
11 months. See Dkt. 36 at 4, 7. In doing so, the Defendant requests the Court sentence him to
12 the low-end of the guidelines range that would have been applicable with regard to his
13 crack cocaine offense if the amendments had been in effect at the time he was sentenced.
14 Id. at 4. Thus, the Defendant requests the Court resentence him to 30 months on count one
15 and 60 months on count two to run consecutive, for a total sentence of 90 months. Id. at 7.

16 Generally, federal courts lack jurisdiction to modify a sentence once it has been
17 imposed. See 18 U.S.C. § 3582(c). Section 3582(c)(2), however, provides a narrow
18 exception. It states, in relevant part:

19 The court may not modify a term of imprisonment once it has been imposed
20 except that . . . in the case of a defendant who has been sentenced to a term of
21 imprisonment based on a sentencing range that has subsequently been
22 lowered by Sentencing Commission pursuant to 27 U.S.C. 994(o), upon
23 motion of the defendant . . . or on its own motion, the court may reduce the
24 term of imprisonment, after considering the factors set forth in section
25 3553(a) to the extent that they are applicable, if such a reduction is consistent
26 with applicable policy statements issued by the Sentencing Commission.

27 A motion for reduction of sentence under § 3582(c)(2) "is simply a vehicle through
28 which appropriately sentenced prisoners can urge the court to exercise leniency to give
[them] the benefits of an amendment to the guidelines." United States v. Townsend, 98
F.3d 510, 513 (9th Cir. 1996). "[T]he decision whether to reduce a sentence under § 3582
is within the discretion of the district court judge." Id. at 512.

1 In response to Defendant's motion, the government argues that Defendant waived his
2 right to file a § 3582 motion in his plea agreement. Dkt. 38 at 3-5. Under the terms of the
3 plea agreement, the Defendant expressly waived "any right [he] may have to file any
4 collateral attack on [his] conviction or sentence, including a . . . motion under 18 U.S.C. §
5 3582. . . ." Plea Agreement ¶ 5. While Defendant concedes that he waived his right to file
6 a motion pursuant to § 3582(c), he argues that § 3582(c) authorizes the Court "on its own
7 motion" to reduce his sentence.² See United States v. Malone, 2012 WL 6760000, at *1
8 (9th Cir. 2012) (Unpub. Disp.) (concluding that a similar waiver provision was enforceable
9 and reversing district court's order reducing defendant's sentence based on a § 3582 motion;
10 noting that although § 3582(2)(c) authorizes a court to reduce a defendant's sentence "on its
11 own motion," that power was not exercised in this case).

12 The government does not contend that the Court lacks the authority to reduce
13 Defendant's sentence "on its own motion" under § 3582(c)(2). Nor does the government
14 challenge the probation officer's conclusion that Defendant is eligible for a sentence
15 reduction under the amendments to the Guidelines, or her determination that the guidelines
16 range that would have been applicable if the amendments had been in effect at the time
17 Defendant was sentenced is 30 to 37 months for count one, i.e., the crack cocaine offense.
18 Instead, the government argues that the interests of justice do not support a sentencing
19 reduction. Dkt. 38 at 5-6. Specifically, the government contends that a sentence reduction
20 is not warranted based on Defendant's prior criminal conduct and his misconduct while
21 incarcerated. See id. According to the government, "[i]t is quite clear - both from
22 defendant's prior criminal conduct and his conduct while incarcerated - that defendant's
23 violent and uncontrolled behavior will continue upon his release" from imprisonment. Id.
24 at 6.

25 Given that the parties and the probation officer agree that Defendant is eligible for a
26 sentence reduction, the next question is whether a reduction is warranted considering the
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28 ² See Dkt. 37 at n. 2.

1 factors set forth in § 3553(a). Among the factors to be considered are: the "nature and
2 circumstances of the offense and the history and characteristics of the defendant"; "the need
3 to avoid unwarranted sentence disparities among defendants with similar records who have
4 been found guilty of similar conduct"; and the need for the sentence imposed "to reflect the
5 seriousness of the offense, to promote respect for the law, and to provide just punishment
6 for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public
7 from further crimes of the defendant"; and "to provide the defendant with needed
8 educational or vocational training, medical care, or other correctional treatment in the most
9 effective manner." 18 U.S.C. § 3553(a). In addition to the § 3553(a) factors, the Court
10 must consider "the nature and seriousness of the danger to any person or the community
11 that may be posed by a reduction in the defendant's term of imprisonment," and may
12 consider the "post-sentencing conduct of the defendant that occurred after imposition of the
13 term of imprisonment." See U.S.S.G. § 1B1.10, Application Notes (B)(ii), (iii); United
14 States v. Lightfoot, 626 F.3d 1092, 1096 (9th Cir. 2010).

15 Here, the Defendant, to his credit, has completed a drug treatment program, applied
16 to participate in the Non-Residential Drug Abuse Treatment Program, and completed a
17 commercial driver's license course during his incarceration. However, the Court agrees
18 with the probation officer's assessment that Defendant's "post-sentencing conduct shows
19 little effort at rehabilitation." Indeed, the information submitted by the probations officer
20 shows that Defendant has repeatedly engaged in misconduct from November 2009 to
21 December 31, 2012, including, but not limited to, threatening bodily harm, engaging in
22 sexual acts, interfering with security devices, possessing intoxicants, indecent exposure,
23 stalking female staff members, being insolent to staff members, refusing to obey orders,
24 and assaulting others without serious injury. The most recent inmate progress report
25 provided by the probation officer indicates that, as of January 23, 2013, there are currently
26 51 incident reports pending relating to Defendant's misconduct. The Defendant, for his
27 part, does not deny that he engaged in the conduct set forth in the probation officer's report
28 or the conduct described in the January 23, 2013 inmate progress report.

1 In addition to his misconduct while incarcerated, the Defendant's criminal history is
2 extensive. The pre-plea presentence report ("PSR") prepared by the probation officer states
3 that the Defendant has juvenile arrests for possession of marijuana for sale, vandalism and
4 obstruct/resist public officer. PSR ¶¶ 32-33. His adult convictions include receipt of
5 known stolen property, possession/purchase of cocaine base for sale, providing a false
6 report, DUI: alcohol/drugs, damaging a jail facility,³ possession with intent to distribute
7 cocaine base, and using, carrying, and possessing a firearm during, in relation to, and in
8 furtherance of a drug-trafficking crime. Id. ¶¶ 34-38; Dkt. 28. The Defendant was also
9 arrested 15 times from March 13, 2003 to January 7, 2007, including arrests for possession
10 of marijuana, contempt: disobey court order, possession/purchase cocaine base for sale,
11 felon/addict in possession of a firearm, and first degree robbery.⁴ PSR ¶¶ 45-59.

12 Although it is undisputed that the Defendant is eligible for a reduction in his
13 sentence, the Court finds that a sentence reduction is not warranted under the
14 circumstances. The Defendant has a persistent, lengthy and serious criminal history,
15 including the underlying offense which involved the selling of crack cocaine while carrying
16 a Tec-9 semiautomatic pistol loaded with 27 rounds of ammunition. According to the PSR,
17 the Defendant fled when approached by a police officer in a high drug trafficking area,
18 ignored the officer's command to stop and get on the ground, attempted to strike the officer
19 in the face with his elbow while climbing a fence in an effort to escape, refused to surrender
20 at gunpoint and after being sprayed with "OC" spray, and attempted to point his firearm at
21 officers after being struck multiple times and taken to the ground. PSR ¶ 6. Following his
22 arrest, the Defendant also threatened to harm the officers after his release from custody. Id.
23 ¶ 8. In his plea agreement, the Defendant admitted the following: on November 8, 2007,

24 _____
25 ³ Following his conviction for damaging a jail facility, the Defendant was arrested
26 for driving without a license and attempting to flee from officers in a negligent manner with
disregard for public safety. PSR ¶ 38. As a result of this conduct, the Defendant's term of
probation was revoked. Id.

27 ⁴ Although no formal charges were filed, the Defendant was cited for possession of
28 narcotic/controlled substance on June 25, 2003, and for loitering and engaging in illegal
drug activity on December 7, 2003. PSR ¶¶ 42, 44.

1 he possessed 2.43 grams of crack cocaine with the intent to distribute it to another person;
2 he possessed a Tec-9 semiautomatic pistol loaded with 27 rounds of ammunition; when
3 approached by police officers, he ran away with the intent to escape; he attempted to elbow
4 a police officer in the head after he was caught in an effort to break free; and he continued
5 to fight with the officer that caught him and other officers in an effort to escape until he was
6 finally arrested. Plea Agreement ¶ 2.

7 Having considered the factors set forth in § 3553(a), the Court exercises its
8 discretion and declines to reduce Defendant's sentence. The Defendant's extensive criminal
9 history, the serious and violent nature of the underlying offense, and Defendant's numerous
10 incidents of misconduct while incarcerated demonstrate that a sentence reduction is not
11 appropriate. See Lightfoot, 626 F.3d at 1096 (holding that district court did not abuse its
12 discretion in refusing to reduce defendant's sentence where his post-sentencing conduct had
13 done nothing to alleviate the court's concern that he is a danger to the community;
14 defendant's record included insolence to custodial staff, fighting, threatening a staff
15 member, threatening bodily harm, and refusing to work). The Court finds that the safety of
16 the community is best protected by the Defendant serving the entirety of his original
17 sentence. The Defendant's criminal conduct and his behavior while incarcerated shows that
18 he poses a serious danger to the community. The Court also finds that the original sentence
19 is appropriate in order to afford adequate deterrence, to reflect the serious nature of the
20 offense, promote respect for the law, and to provide just punishment. Accordingly, the
21 Defendant's request for the Court to reduce his sentence on "its own motion" under §
22 3582(c) is DENIED.

23 **II. CONCLUSION**

24 For the reasons stated above, IT IS HEREBY ORDERED THAT:

25 1. The Defendant's motion for a sentence reduction under § 3582(c) is DENIED.
26 The Defendant's alternative request for the Court to reduce his sentence "on its own
27 motion" under § 3582(c) is DENIED.

28 2. This Order terminates Docket 36.

1 IT IS SO ORDERED.

2 Dated: 2/22/13

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4 SAUNDRA BROWN ARMSTRONG
5 United States District Judge
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